IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CRYSTAL MARVELLE CHATMAN, Appellant.	No. 61829-6-I DIVISION ONE UNPUBLISHED OPINION FILED: July 27, 2009

J. Leach – Chatman appeals her conviction for two counts of second degree theft. She argues the trial court erred in refusing to grant a mistrial after a police officer made a reference to her booking photograph and in communicating with the jury outside her presence about reviewing a surveillance videotape. We hold that the court did not err in denying a mistrial because the officer's general reference was not a serious irregularity requiring reversal. While the court erred in communicating with the jury outside Chatman's presence about viewing the videotape, that error was harmless because the parties' attorneys were present during this communication and because the jury only asked to review portions of the videotape that had been played at trial.

Background

On April 27, 2007, employees Amanda Gardner, Dean Morgan, and

Darren Cabrera were working at the Louis Vuitton store located in downtown Seattle. At approximately 1:50 p.m., a woman later identified as Chatman came into the store, and Gardner greeted her. About five minutes later, Chatman told Gardner that she was interested in a wallet on the counter. Gardner informed her that she had one boxed in the back that could be picked up later and suggested that Chatman look at other items in the store. Gardner watched Chatman walk to an open display case of small leather goods. Although Gardner's view was blocked by Chatman's body, she noticed that when Chatman backed away from the display one of the wallets was missing. Gardner went to the back of the store and reported her suspicions to her supervisor, Darren Cabrera, and asked Cabrera to review the surveillance video.

Cabrera watched the video and saw Chatman select two wallets from the display and return only one of them. As Cabrera was reviewing the video, Morgan reported that Chatman had left the store, stating that she needed to get cash to purchase the wallet. The incident was reported to the police. The missing wallet, valued at over $500, was never recovered.

On May 2, 2007, Cabrera and Jenina Artatis were working when Chatman entered the store around noon. Chatman told Artatis that she wanted a particular shoe for her daughter's birthday. Artatis went to the back of the store to look for the requested size. Cabrera was then informed by a sales associate that the same woman caught on the surveillance video on April 27 was in the store. Cabrera went on to the sales floor and recognized the woman as

Chatman. He went back to watch the security camera, where he saw her take a wallet, conceal it, and leave the store, setting off the alarm. Security guard Mark Kent confronted Chatman, who told Kent that her cell phone had triggered the alarm. Cabrera came out from the back and was able to see Chatman a second time as she was leaving the store.

Cabrera then checked the surveillance tape, which showed that two wallets were missing from their display cases; one video showed Chatman removing one of the wallets and concealing it on herself. These wallets, taken together, were valued at more than $1,000.

Seattle Police Department Officer James Garner responded to Cabrera's call reporting a theft. Garner obtained a physical description of the suspect and still photograph of her face from the surveillance video. Garner showed the photograph to other officers. Officer Jason Drummond identified the woman in the photograph as Chatman, whom he had seen approximately three weeks earlier. From Drummond's identification, Garner obtained a booking photograph of Chatman.

The next day, Detective Philip Wall used the booking photo to create a photomontage. Employees Gardner and Morgan chose Chatman's photograph as the person who had taken the wallets on April 27, 2007. Cabrera chose Chatman's photo as the person involved in both the April 27 and May 2, 2007, incidents. But Artatis selected the photograph of a different woman as the person involved in the May 2, 2007, incident. Kent was shown the montage but

was unable to make a selection.

Chatman was charged with two counts of second degree theft on June 28, 2007. Before trial, the court granted a pretrial motion to exclude evidence of Chatman's prior arrests. But the court allowed the State to elicit testimony that Officer Drummond knew Chatman from "a previous contact."

At trial, Officer Garner testified that he had shown the still photograph of the suspect's face from the surveillance video to Officer Drummond, who identified the woman as Chatman. With this information, Officer Garner testified that he had obtained a booking photograph of Chatman:

> Q: I'm showing you State's Exhibit 11. Again, if you could look at it without showing it to the jury, can you tell us if you recognize this?
>
> A: I do.
>
> Q: What is it?
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> A: It looks like a booking photo obtained from JEMS.
>
> Q: Can you tell us how you are able to confirm who the picture is?
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> A: The pictures matched up to, I believe, someone who has been booked into, say, King County Jail or some other facility.

Chatman objected. The court sustained and instructed the jury "to make no inferences from that testimony and disregard that testimony entirely."

At the next recess, Chatman moved for a mistrial based on Garner's reference to her booking photograph. After considering arguments, the court

denied the motion, holding that:

> There was a violation of the pretrial order. . . . [Officer Garner] left it to absolutely no imagination that there had been a prior arrest of this defendant. However, there was no indication of what the arrest was for. . . . [T]his could have been for anything, any very minor violation.

The court offered to provide a further limiting instruction, but the defense did not request one.

During trial, all four employees, Gardner, Morgan, Cabrera, and Artatis, identified Chatman in court as the person involved in both incidents on April 27 and May 2, 2007. Artatis testified that although she chose someone else in the montage, she believed it was Chatman whom she saw in the store on May 2.

Before closing arguments, the parties agreed that the jury could watch the entire video, not just the portions played at trial. The parties also agreed to the procedure for playing the video: the prosecutor would set up the computer and allow the jurors to watch the video in front of the prosecutor and defense counsel. Chatman was present during these discussions, and neither she nor her counsel objected.

After beginning deliberations, the jurors asked the court if they could watch the portions of the videotape that had been played at trial. They also wanted to pause the videotape at certain points. The court decided that this was acceptable. Both attorneys were present during the court's discussion with the jury and for the playing of the surveillance videotape; the proceedings involving the actual playing were not recorded. Chatman was not present during

these proceedings.

The jury found Chatman guilty on both counts. She appeals.

Standard of Review

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion.[1]

Discussion

A. Reference to Booking Photograph

Chatman contends that the trial court erred in denying her motion for a mistrial. She specifically argues that Officer Garner's reference to her booking photograph was a serious trial irregularity that deprived her of a fair trial.

A court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly."[2] In determining whether a trial irregularity, such as a witness's statement, warrants a new trial, we consider three factors: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the trial court properly instructed the jury to disregard the statement, which the jury is presumed to follow.[3]

Chatman compares the irregularity here to the one requiring reversal under these three factors in State v. Escalona.[4] But Escalona is distinguishable.

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[1] State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).
[2] State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).
[3] State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).
[4] 49 Wn. App. 251, 742 P.2d 190 (1987).

In that case, Escalona was charged with assault while armed with a deadly weapon, a knife.[5] Before trial, the court granted a defense motion in limine to exclude any reference to Escalona's prior conviction for the same crime.[6] At trial, Vela, the State's primary witness, testified that Escalona "already has a record and had stabbed someone."[7] Although the judge instructed the jury to disregard the statement, Escalona moved for a mistrial, which was denied.[8]

On appeal, this court, in its analysis under the first factor, the seriousness of the irregularity, held that Vela's statement was "extremely serious" in light of ER 609 and 404(b).[9] The court further emphasized the weakness of the evidence against Escalona, pointing out that the State's entire case essentially rested on Vela's testimony, which contained many inconsistencies.[10] The court next determined that the second factor, whether the statement was cumulative, undermined the trial's court's ruling since it ruled in limine to exclude evidence relating to the prior conviction.[11] Finally, in applying the third factor, whether the trial court's instruction to disregard the statement could cure the error, the Escalona court determined that Vela's statement was inherently prejudicial due to "the logical relevance of the statement," reasoning that "the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona

[5] Escalona, 49 Wn. App. at 252.
[6] Escalona, 49 Wn. App. at 252.
[7] Escalona, 49 Wn. App. at 253.
[8] Escalona, 49 Wn. App. at 253.
[9] Escalona, 49 Wn. App. at 255.
[10] Escalona, 49 Wn. App. at 255.
[11] Escalona, 49 Wn. App. at 255.

acted on this occasion in conformity with the assaultive character he demonstrated in the past."[12] The Escalona court concluded that the prejudicial effect of Vela's statement could not be cured due to "the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement."[13] Accordingly, the court held that the trial court abused its discretion in denying Escalona's motion for a mistrial.[14]

Here, analysis under the first and third factors differs from Escalona. Unlike Vela's reference to a specific crime committed by Escalona, Officer Garner's reference in this case did not refer to any specific acts or crimes committed by Chatman. In addition, unlike the State's case in Escalona, the State's case here is supported by substantial evidence—namely the positive identifications by Cabrera, Morgan, Gardner, and Artatis plus the videotape. Finally, unlike Vela's statement in Escalona, Garner's statement does not have the same degree of "logical relevance" due to its lack of specificity: the jury would not undoubtedly conclude from Garner's reference to Chatman's booking photo that Chatman had a propensity for committing theft. The trial court correctly held that Garner's statement was not a serious irregularity and that a curative instruction would remove any possible prejudicial effect caused by the statement.

B. Communication Between the Court and Jury

[12] Escalona, 49 Wn. App. at 256.
[13] Escalona, 49 Wn. App. at 256.
[14] Escalona, 49 Wn. App. at 256.

Chatman next argues that her right to be present at all critical stages of the proceeding was violated when the trial court discussed viewing the videotape with the jury outside her presence.

Generally, the trial court should not communicate with the jury in the absence of the defendant.[15] While improper communication between the court and jury is an error of constitutional dimensions,[16] that error may be harmless.[17] The defendant must first raise at least the possibility of prejudice.[18] The State then bears the burden of showing that the error was harmless beyond a reasonable doubt.[19]

In State v. Rice, our Supreme Court addressed a similar situation and held the communication between the court and the jury was harmless error. [20] There, the jury asked to rehear Rice's taped confession, and the court and the attorneys agreed, in Rice's absence, that the jury could replay the confession tape.[21] Rice argued on appeal that he did not waive his right to be present.[22] In rejecting this argument, our Supreme Court held that, while the trial court's communication with the jurors was erroneous, such error was harmless because a third party was present at the time of the communication and that "nothing was

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[15] State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997).
[16] State v. Rice, 110 Wn.2d 577, 613, 757 P.2d 889 (1988).
[17] Bourgeois, 133 Wn.2d at 407.
[18] Bourgeois, 133 Wn.2d at 407.
[19] Bourgeois, 133 Wn.2d at 407.
[20] 110 Wn.2d 577, 614, 757 P.2d 889 (1988).
[21] Rice, 110 Wn.2d at 613.
[22] Rice, 110 Wn.2d at 613.

replayed to the jurors that they had not heard earlier in the trial."[23] Similarly, in this case, other parties, namely the attorneys, were present during the communication between the court and jury. In addition, the jury only requested to view parts of the videotape previously played in court.

Chatman attempts to distinguish Rice on the basis that the court here allowed the jury to pause the video, producing a danger of unfair prejudice and overemphasis on the videotape. Our Supreme Court rejected this argument in State v. Castellanos.[24] In that case, the court held that there was no danger of unfair prejudice or overemphasis in providing jurors with a recording and playback machine so that they could listen to the recording as many times as they wished:

> The fact the jury had unlimited access to the recordings and could play them at its whim does not prove it gave undue prominence to the exhibit. The playback machine allowed the jury to utilize the tapes as any other exhibit.[25]

In line with Rice and Castellanos, Chatman's absence during the court's discussion with the jury about viewing the videotape was harmless error.

C. Statement of Additional Grounds

Chatman asserts several other issues in her statement of additional grounds. These issues include the following: (1) a claim that her defense did not conduct a complete investigation regarding alibis, witness requests, and the

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[23] Rice, 110 Wn.2d at 613-14.
[24] 132 Wn.2d 94, 935 P.2d 1353 (1997).
[25] Castellanos, 132 Wn.2d at 102.

surveillance video; (2) a claim that she was denied the right to testify on her behalf; and (3) a claim that she was denied a speedy trial. These claims, however, relate to matters outside the record, so we cannot address them on direct appeal.[26]

Conclusion

The trial court did not err in denying a mistrial because Officer Garner's nonspecific reference to Chatman's booking photograph was not a serious irregularity warranting reversal. Although the court erred in communicating with the jury outside Chatman's presence about viewing the surveillance video, that error was harmless because the attorneys were present during this communication and because the jury only asked to watch parts of the video that had been played at trial.

Affirmed.

Leach, J.

WE CONCUR:

Appelwick, J.

Dwyer, A.C.J.

[26] State v. McFarland, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).